

	OAH 3-1005-21517-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Real Estate Salesperson License Application of Michael Patrick Otto	FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on November 16, 2010, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The record closed at the conclusion of the hearing.

Michael J. Tostengard, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101 appeared for the Department of Commerce (the Department or DOC). Nathan Nelson, Vitus Law PLLC, appeared for Michael Patrick Otto (the Respondent).

STATEMENT OF THE ISSUE

The issue presented is whether the Respondent's application for a real estate salesperson license should be denied because:

1. The Respondent filed an application that was false, misleading or incomplete, in violation of Minn. Stat. §§ 82.82, subd. 1(a), and 45.027, subd. 7(a)(3) (2008);
2. The Respondent engaged in an act or practice demonstrating that he is untrustworthy, financially irresponsible, or otherwise unqualified to act under a license granted by the Commissioner, as provided in Minn. Stat. § 45.027, subd. 7(a)(4); and
3. The Respondent has engaged in a fraudulent, deceptive, or dishonest practice, as provided in Minn. Stat. § 82.82, subd. 1(b).¹

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

¹ All references to Minnesota Statutes are to the 2008 edition.

FINDINGS OF FACT

1. On May 6, 2010, the Respondent submitted an application for licensure as a real estate sales person.²

2. On the application, the Respondent answered “yes” to the question “Have you ever been convicted of a crime, had a judgment withheld or deferred, or have you been charged with committing a crime?”

3. The Respondent attached documents to the application reflecting that in 1998 the Respondent pleaded guilty to 12 counts of bank fraud (18 U.S.C. § 1344) in two federal cases, one originating in the District of Minnesota and another in the Southern District of Florida. The convictions stemmed from a check-kiting scheme used to create and maintain falsely inflated balances at numerous banks.³ The conduct in Florida involved the use of a false name, the creation and cashing of duplicate checks in the amount of about \$62,000, and the forgery of signatures on those checks.⁴

4. On June 19, 1998, the Respondent was sentenced by the U.S. District Court, District of Minnesota, to a term of 24 months in federal custody and was required to make restitution payments in the amount of approximately \$72,000 to various financial institutions in Minnesota.⁵

5. The Respondent was originally arrested in the state of Kansas and was convicted of two related charges (making a false writing and attempting to make a false writing) in July 1997.⁶ While in custody in Kansas, he was interrogated by agents of the Federal Bureau of Investigation, after which his custody was transferred to the federal authorities and he was charged with the federal offenses described above. His sentence in Kansas expired in July 1999.⁷ The Respondent did not include information about the Kansas convictions in the materials provided with the license application.

6. The Respondent appealed his sentence to the Eighth Circuit Court of Appeals, arguing that he should have received credit for the time served on the related convictions in Kansas. The Eighth Circuit affirmed the Respondent’s sentence.⁸

7. The Respondent served his sentence at the federal prison in Sandstone, Minnesota. He was supervised by a federal probation officer until August 2004, when his sentence expired and he was discharged from probation.

² Ex. 1.

³ Ex. 1, Attachment to license application at page 12 of 23.

⁴ *Id.*, Attachment at pages 8-11 of 23.

⁵ *Id.*, Attachment at pages 13-16 of 23.

⁶ <http://165.201.143.205/kasper2/offender.asp?id=35318>.

⁷ *Id.*; Testimony of Michael Otto.

⁸ Ex. 2.

While on probation he received counseling and treatment to address a gambling addiction.⁹

8. By January 2006, the Respondent had either paid in full or negotiated a compromise of the restitution obligations of his sentence. The monetary judgment against him was canceled at that time.¹⁰

9. The Respondent was married in 2000 and has since had two children.¹¹

10. After his release from prison, the Respondent was employed doing framing and concrete work for several building contractors.¹²

11. He was also an employee of Mike Otto Construction, Inc., a company owned and operated by his wife, who has a background in business management. The company was successful for several years but faced a downturn in business during the recent recession.¹³

12. The Respondent is now the owner and employee of Fair and Square Construction Services, LLC, a licensed residential building contractor.¹⁴

13. The Respondent has not been arrested or charged with any crime since his 1998 convictions. He has not been involved in any civil litigation, and no complaints have been filed with regard to construction work he has done since that time.¹⁵

14. In the course of his work in the construction business, the Respondent has handled client funds and has been inside the homes of many clients.¹⁶

15. The Respondent is interested in purchasing, renovating, and selling previously foreclosed properties. He is pursuing a real estate license to facilitate these transactions.

16. The Respondent has completed the required coursework to obtain a real estate sales license, and he has passed the Minnesota and national real estate examinations.¹⁷

⁹ Ex. 1, Attachment to license application at pages 3 & 14 of 23; Ex. 13; Test. of M. Otto.

¹⁰ Ex. 1, Attachment to license application at page 2 of 23; Exs. 11 & 12.

¹¹ Test. of M. Otto.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ex. 1, Attachment to license application at pages 19-23 of 23.

17. The Department advised the Respondent of its intent to deny the application for a real estate license, and the Respondent requested a hearing. The Department issued a Notice and Order for Hearing, Order to Show Cause, and Statement of Charges on September 2, 2010.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Commerce (Commissioner) have jurisdiction to consider this matter.¹⁸

2. Respondent received due, proper and timely notice of the charges against him and of the time and place of the hearing. He timely requested a hearing on the matter. This matter is, therefore, properly before the Commissioner and the Administrative Law judge.

3. The burden of proof in this matter is on the Respondent to prove that a license should be granted.¹⁹

4. The Commissioner may by order deny an application for a license if the commissioner finds that the order is in the public interest and that the applicant has filed an application for a license that is incomplete in any material respect.²⁰

5. The Respondent has demonstrated that his application for a real estate license should not be denied because it was materially incomplete.

6. The Commissioner may deny a license to an applicant if the Commissioner finds that the applicant has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant is “untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.”²¹

7. Respondent’s convictions for bank fraud demonstrate that he has engaged in an act or practice demonstrating he is unqualified to act under authority or license granted by the commissioner within the meaning of Minn. Stat. §45.027, subd. 7(a)(4).

¹⁸ Minn. Stat. §§ 45.027, subd. 7 and 14.50.

¹⁹ Minn. R. 1400.7300, subp. 5.

²⁰ Minn. Stat. § 82.82, subd. 1(a).

²¹ Minn. Stat. § 45.027, subd. 7(a)(4).

8. The Commissioner may by order deny a real estate salesperson's license if the Commissioner finds that the order is in the public interest and the applicant has engaged in a fraudulent, deceptive, or dishonest practice.²²

9. The Respondent's convictions for bank fraud demonstrate deceptive conduct sufficient to preclude him from obtaining a real estate salesperson's license.

10. Denial of the Respondent's application for a real estate salesperson's license is in the public interest.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The decision to deny the application of Respondent for a real estate salesperson license should be AFFIRMED.

Dated: December 13, 2010

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Digitally recorded, no transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Commerce will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Deputy Commissioner Emmanuel Munson-Regala, 85 Seventh Place East, Suite 500, St. Paul, Minnesota 55101, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to

²² Minn. Stat. § 82.35, subd. 1(b).

the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

The record reflects that the Respondent has conducted his business and personal affairs responsibly since his release from prison. He satisfied his restitution obligation and has worked as a building contractor for many years without drawing any complaints from his customers. The Administrative Law Judge credits his testimony that he has changed his life dramatically and is no longer the person he was when he was sentenced twelve years ago. His application to become a licensed real estate sales person, however, cannot be granted. Licensed real estate salespersons act as agents for others involved in real estate transactions. Agency relationships create fiduciary responsibilities, which are among the most stringent and demanding of legal relationships.²³ The Respondent's criminal record may reflect a past life, but it precludes the Department from granting his application for a license to act as a fiduciary. It might also preclude him from effectively defending himself should any dispute over those obligations lead to litigation.²⁴

The Administrative Law Judge has concluded, however, that the Respondent's failure to explicitly reference the Kansas convictions is not a basis for denying the license. These convictions were a small part of a much larger picture that the Respondent clearly disclosed. Because of the passage of time, the Respondent had to obtain documents relating to the Minnesota convictions from Chicago, and he may not have realized that these documents did not explicitly reference the Kansas convictions. The Administrative Law Judge does not believe the Respondent had any intention of hiding this information and that he would have supplemented the application promptly had the Department requested it.

K.D.S.

²³ See Minn. Stat. § 82.67; Restatement (Third) of Agency Ch. 8 (2006).

²⁴ See Minn. R. Evid. 609.